

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT TO APPROPRIATE WATER)	PRELIMINARY ORDER
NO. 65-22896 IN THE NAME OF)	
TIM AND/OR RONDA ROGERS)	
_____)	

On May 19, 2004, Tim and/or Ronda Rogers ("Rogers") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). IDWR numbered the application as 65-22896. IDWR published notice of the application.

Emmett Irrigation District protested application no. 65-22896. In the protest, Emmett Irrigation District stated:

The applicant has sufficient water being delivered through the EID [Emmett Irrigation District] to water his property. This is an irrigation well which is unnecessary. With this well and water from the EID applicant can water 20 acres.

The protest also stated the following in a section of the protest form asking what would be required to resolve the protest:

Any water from this well should be subordinate to any water received from the EID. The water should be treated as secondary to water received through the EID.

On June 28, 2007, IDWR conducted a hearing regarding the protest to application no. 65-22896. After having reviewed the evidence, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Rogers own approximately 11 acres of pasture ground located in the NESE¹, Section 9, Township 6 North, Range 1 West, near Emmett, Idaho. The entire 11 acres are entitled to receive surface water delivered by Emmett Irrigation District for irrigation.

¹ In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NE1/4SE1/4, Section 9, Township 6 North, Range 1 West, Boise Meridian.

2. Historically, Rogers' land was part of a 50-acre fruit orchard. The orchard was subdivided into four parcels

3. Surface water was delivered to Rogers' land and the other three subdivided properties through a common ditch or pipeline. The delivery ditch or pipeline is a "distribution ditch" from a canal and is a "lateral" as defined by Idaho Code § 42-1301. Because three or more parties take water from the lateral, under Idaho Code § 42-1301, "the parties [taking water from the lateral] . . . constitute a water users' association known as 'Water Users Association of Lateral or Laterals.'"

4. Between approximately 2001 and 2003, Rogers and the other users on the lateral ditch disputed over the operation of the lateral ditch. As a result of the dispute, Rogers have not received surface water from the lateral ditch. Surface water was last used on the Rogers' property in 2001

5. Application to appropriate water no. 65-22896 proposes the following:

Source:	Groundwater
Priority:	May 19, 2004
Flow Rate:	0.20 cfs
Nature of Use:	Irrigation of 10 acres
Period of Use:	March 1 through November 15
Point of Diversion:	NESE, Section 9, Township 06 North, Range 01 West
Place of Use:	NESE, Section 9, Township 06 North, Range 01 West

6. Rogers intend to leave the surface water appurtenant to their pasture ground. At the present time, they have paid all the necessary assessments and fees to Emmett Irrigation District for retaining the surface water on their lands.

7. If the delivery problems on the lateral are resolved, Rogers will resume use of the surface water, and only use the ground water for supplemental use.

8. Rogers will irrigate 10 acres of pasture with the ground water sought to be appropriated by application no. 65-22896

9. Ground water underlying Rogers' property is very close to land surface. There is a significant quantity of ground water available for appropriation.

10. At the diversion flow rate of 0.20 cfs, pumping from the proposed well will not reduce the quantity of water available for other water rights.

11. Rogers estimate the cost of drilling a well at between \$8,000 and \$9,000. Rogers have already paid a \$4,000 deposit to a well driller to drill the well. In addition to the cost of the well, the pump and additional equipment for the well will cost approximately \$4,000. Following completion of the well, Rogers intend to sprinkler irrigate the property.

12. Tim Rogers is employed by the Idaho National Guard and has sufficient income to fund the construction of the well and associated delivery system.

13. As a result of the dispute between the users on the lateral ditch, Emmett Irrigation District has reduced the quantity of water delivered into the lateral because of non-use by Rogers.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 67-6537 states the following:

Use of Surface and Groundwater. – (1) The intent of this section is to encourage the use of surface water for irrigation. All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary source for irrigation. Surface water shall be deemed reasonably available if:

(a) A surface water right is, or reasonably can be made, appurtenant to the land;

(b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity's distribution system is capable of delivering the water to the land; or

(c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.

4. Legal issues posed in this particular contested case are: (a) to what extent is IDWR directed to enforce the provisions of Idaho Code Section 67-6537, which is a land use planning statute; (b) whether the subdivision of a 50-acre orchard into four parcels and a change to pasture or other irrigation is a "land use change" under Idaho Code § 67-6537; and (c) whether IDWR can refuse an appropriation of ground water for irrigation that is sought because surface water is not being delivered to the property, even though a surface water right remains appurtenant to the property?

5. Under the definition of "reasonably available" contained in Section 67-6537, the land owned by Rogers is "entitled to distribution of surface water from an irrigation district." Furthermore, Emmett Irrigation District's "distribution system is capable of delivering the water to the land." In addition, "Emmett Irrigation District's surface water right is ... appurtenant to the land." Surface water is reasonably available to the Rogers property.

6. The lateral ditch delivering water to Rogers' property is not directly under the control of Emmett Irrigation District's distribution system. The lateral ditch is part of the distribution system delivering Emmett Irrigation District water to the district's patrons.

7. Idaho Code § 67-6537 is contained within the land use planning chapter of the code. Subparagraph 3 of Idaho Code § 67-6537 states:

Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder.

8. The provisions of Section 67-6537 are operative only when there is a "land use change" not a water right change, even if the proposed water right change is a change in the nature of use. Section 67-6537 is a directive to local governments that are responsible for local land use planning and are considering a change in the use of land proposed by the landowner. As a result, Section 67-6537 does not mandate that IDWR require the use of surface water appurtenant to property when considering an application for the appropriation of water.

9. Despite the above conclusion, Section 67-6537 is a statement of public policy that surface water, when a right for the use thereof is appurtenant to property, or when reasonably available, should be used prior to the use of ground water.

10. IDWR cannot dictate a solution to the dispute between the users on the lateral ditch. IDWR can, however, require a person seeking a new appropriation to do all things necessary for the delivery of the surface water. Consequently, Rogers should be required to pay all assessments levied by the Emmett Irrigation District. In addition, Rogers should be required to pay their proportionate share of the cost of maintaining the lateral ditch, even if Rogers' surface water is not being delivered. Until Rogers resumes use of the surface water, Rogers' proportionate share of maintenance should not exceed

the lowest cash payment for assessment paid by any member of the lateral ditch association. By linking Rogers' assessment to the cash assessment paid by other association members, Rogers are protected from being assessed a disproportionate share of the cost of water delivery by the other members of the association.

11. Diversion of water at the location and in the quantities sought by the application will not reduce the quantity of water available to other water users.

12. The water supply is sufficient to provide the water necessary for the purposes sought.

13. The application is not filed for purposes of speculation, delay, or in bad faith.

14. Use of ground water for growing crops or pasture when surface water is not available is in the local public interest.

15. Sprinkling water on irrigated cropland is consistent with principles of conservation of the waters of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 65-22896 is **Approved** subject to the following conditions:

Proof of beneficial use shall be submitted on or before January 1, 2011.

Subject to all prior water rights.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

This right does not grant any right-of-way or easement across the land of another.

This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor exceed a combined annual maximum diversion volume of 45 af at the field headgate for the lands above.

After specific notification by the Department, the right holder shall install a suitable measuring device or enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

If the surface water right(s) appurtenant to the place of use is abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

The right holder shall pay all assessments levied by the Emmett Irrigation District related to the right for delivery of surface water to irrigate the place of use.

The right holder shall pay the proportionate share of the cost of maintaining and delivering water through the lateral ditch in which Emmett Irrigation District surface water would be delivered to the place of use, even if surface water is not being physically delivered to the place of use. Until Rogers resumes use of the surface water, the right holders' proportionate share should not exceed the lowest cash payment for assessment paid by any member of the lateral ditch association.

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

Failure of the right holder to comply with any condition of approval is cause for the Director to void this permit.

Dated this 21st day of December, 2007.

A handwritten signature in cursive script, reading "Gary Spackman", is written over a horizontal line.

Gary Spackman
Hearing Officer